



STATE OF NEW JERSEY

Board of Public Utilities

*Two Gateway Center
Newark, NJ 07102*

CABLE TELEVISION

IN THE MATTER OF THE PETITION OF)
CLEAR CABLEVISION, INC., D/B/A)
ADELPHIA COMMUNICATIONS)
CORPORATION, FOR APPROVAL OF A)
CONSTRUCTION AND USE AGREEMENT)
WITH MCI TELECOMMUNICATIONS, INC.)

ORDER

DOCKET NO. C094080355

Francis R. Perkins, Esq., Meyner & Landis, One Gateway Center, Newark, New Jersey,
for Petitioner.

BY THE BOARD:

On or about August 12, 1994, Adelphia Communications Corporation Inc., ("Petitioner") filed a petition for approval to enter into a Construction and Use Agreement ("Agreement") with MCI Telecommunications, Inc. ("MCI"). Said petition was filed pursuant to N.J.S.A. 48:5A-40 and 41, and N.J.A.C. 14:17-6.10. Petitioner is a franchised cable television operator under the jurisdiction of the Board pursuant to N.J.S.A. 48:5A-1 et seq., and provides cable television service to approximately 100,000 cable subscribers in Ocean County, New Jersey. MCI is a telecommunications service provider engaged in the provision of interexchange telecommunications services.

Petitioner, with offices located at 5 West Third Street, Coudersport, Pennsylvania, has constructed and operates an aerial and/or underground fiber optic transmission facility as part of its existing cable system, out of which MCI will have the authorized right, upon the Board's approval, to use certain fibers in the facility. Under the terms of the Agreement, Petitioner has granted to MCI an "indefeasible right of use" ("IRU"), which constitutes an exclusive right for MCI to use a specific number of fibers. Petitioner retains ownership of the fibers and is also responsible for maintaining and repairing the facility.

The fiber optic facility is being used by both Petitioner and MCI. Petitioner is using part of the facility in connection with the delivery of its cable television service. MCI's portion of the facility is used to provide additional capacity for its backbone network expansion in New Jersey, which connects New York and Washington, D.C. This network also carries additional capacity for international traffic that is switched at MCI's facilities in Northern New Jersey.

Construction of the fiber optic system is limited to a length of 51,800 feet (approximately 10 miles) passing through Petitioner's service territory. As proposed, the fiber facility will be used to link MCI's existing facilities located in Stafford Township, New Jersey with the Jersey Central Power & Light ("JCP&L") Oyster Creek Nuclear Generating Station in Lacey Township, New Jersey. To complete the link, the fiber facility has been routed through the Townships of Stafford, Barnegat, Ocean and Lacey.

The Agreement is for a period of thirty (30) years, plus up to two (2) ten-year extension periods, subject to the continuation of Petitioner's franchise rights, for a total possible term of fifty (50) years. Under the terms of the Agreement, MCI has paid fifty percent (50%) of all labor and material costs required to install the fiber optic facility. MCI has paid one hundred percent (100%) for that portion of the system that was constructed solely for MCI's benefit. The structure of the Agreement places responsibility for payment of MCI's portion of the construction cost on MCI, which allows Petitioner to recover the applicable costs of construction. The total payment for the foregoing was \$65,000.00. In addition to retaining ownership of the fiber optic facility, all maintenance and repair functions will be performed by Petitioner. Petitioner will also schedule and perform periodic maintenance for that portion of the system used by MCI. In return, MCI has paid Petitioner a one-time fee of fifty thousand dollars (\$50,000) for such scheduled maintenance during the initial term of the Agreement.

Petitioner contends that approval of the proposed Agreement is in the public interest, as the fiber optic system will be used to support a major network expansion for MCI. As a result, MCI and the public will benefit from increased reliability in telephony and telecommunications services. As the scope of construction was limited to only 51,800 feet of fiber optic cable, and the construction costs for MCI's portion of the fiber system are being borne by MCI, there will be no cross-subsidization of costs by Petitioner's regulated cable television operations. Additionally, as the Agreement is in the form of an IRU, no recurring revenues will be generated by Petitioner resulting from MCI's use of the fibers. (IRU agreements are typically made between companies that provide international and/or overseas telecommunications services).

On January 22, 1996, the Board's staff and the Division of Ratepayer Advocate met with the Petitioner and all the parties to discuss the proposed Agreement. The Board's staff expressed concerns as to the interests of the municipalities affected by the IRU Agreement. To reconcile any concerns as to the municipalities' potential interests, Petitioner agreed to notify the affected municipalities of their right to petition the Board pursuant to N.J.S.A. 48:5A-30(c) for the payment of additional franchise fees in connection with construction of the fiber system. By letters dated February 23, 1996, February 26, 1996, February 27, 1996, March 29, 1996 and August 19, 1996, the affected municipalities responded to Adelphia's notice concerning the issue of additional fees. The affected municipalities indicated that because no recurring revenues would be generated, and the scope of construction was limited to 51,800 feet, they would not be seeking payment of additional franchise fees in connection with this Agreement.

Approval of the Agreement will in effect grant nunc pro tunc authorization for Petitioner's construction of 51,800 feet of fiber optic cables, a portion of which is presently being used for the transmission of non-cable related telecommunications services. The Board has previously approved similar arrangements between a cable television operator and a telecommunications provider. Most recently, the Board approved an agreement between RCN and Metropolitan Fiber Systems of New Jersey. I/M/O Petition of RCN of New Jersey, d/b/a C-TEC Cable Systems, for Approval to Grant an Interest in Certain Excess Fiber Facilities to Metropolitan Fiber Systems of New Jersey, Inc. Order of Approval, Docket No. CO98070435, (November 4, 1998).

The Board has reviewed the petition and the supplementary information provided in response to the Board staff's discovery. In its review, Board staff focused primarily on whether the Agreement and proposed construction would impact on Petitioner's cable television operations. As noted above, MCI will pay the full cost of the construction for that portion of the fiber cable to be used by MCI, and fifty percent (50%) of the cost for the remainder of the fiber installed for Petitioner's sole use. Additionally, since Petitioner's cable rates are based on the Federal Communications Commission's ("FCC") benchmark approach, 47 C.F.R. § 76.901 et seq., all costs associated with Petitioner's cable plant construction are excluded from the rate base number. The Board also notes that municipal interests are also protected by virtue of N.J.S.A. 48:5A-30(c), which permits a Municipality to petition the Board for permission to charge a yearly franchise fee exceeding 2%.

The Board notes that the maximum term of the Agreement, including extensions is fifty (50) years, but that the length of cable television franchises are generally fifteen (15) years, and are renewed pursuant to the provision of federal and state law. Therefore, Adelphia's right to convey the facilities in question is subject to maintaining and renewing its right to remain in the public right-of-way.

Based on the above, the Board HEREBY FINDS that the proposed Agreement between Petitioner and MCI will provide a benefit to residents of the State in the form of increased reliability in telecommunications services. Allowing MCI to use Petitioner's facilities will increase MCI's reliability as a competitive provider of interexchange telecommunications services. Furthermore, the Board believes that the proposed Agreement will not have a negative impact on Petitioner's financial health. Under the terms of the Agreement, MCI has made a direct one-time payment for all costs associated with the construction of the facilities to be used by MCI.

The Board believes this is a positive step towards the continuing diversity in the evolving telecommunications marketplace. The economies that will be achieved by MCI's use of Petitioner's fibers should serve to induce other telecommunications providers to operate more efficiently and ultimately reduce their prices. Therefore, the Board HEREBY APPROVES, nunc pro tunc, the proposed Agreement with the following conditions:

1. Use of the fiber system by MCI shall not lessen Petitioner's obligation to its subscribers or impair its ability to provide safe, adequate and proper service.
2. Petitioner shall keep records of all repair and maintenance costs associated with the fiber cables used by MCI.
3. Petitioner shall keep records of all incremental pole attachment costs, which are attributable to the construction of the fiber facility. The incremental costs shall include but not be limited to pre-construction survey costs, engineering costs, make-ready costs and change-out costs, and shall be kept in a manner that will allow for the imputation of MCI's costs to its portion of the fiber facility.
4. Petitioner shall keep records of the number of fiber cables being used by MCI.
5. Approval of the petition shall be limited to the number of fibers and geographic area specified in the Agreement.

6. Petitioner shall keep its books and records in a manner that all costs, charges, accounting entries and associated matters, including operating and maintenance costs, regarding this Agreement can be readily obtained and/or determined.
7. If Petitioner files a cost-of-service showing, the Board and its staff reserve the right to review the filing and adjust it to the extent necessary to eliminate any cross-subsidization of regulated cable service rates.
8. Notwithstanding any terms in the Agreement or related documents, approval herein shall not automatically approve any inter-company loan arrangement among or between Petitioner and MCI, and related parties, if Board approval is required under applicable law.
9. Within ten (10) days of the date of this Order, Petitioner and MCI shall serve a copy of this Order upon all affected municipalities, along with notice of the municipality's right to petition the Board in the future for increased fees if warranted under N.J.S.A. 48:5A-30(c) and N.J.S.A. 54:30A-124. Proof that this Order has been served upon the affected municipalities and the required notice given, shall be filed by Adelphia and MCI with the Board in affidavit form. Adelphia and MCI shall include with their filing of proof of service, a copy of the notice given to affected municipalities.
10. Petitioner and MCI shall comply with all the terms of the Board's Order.
11. This approval does not constitute the Board's approval of a transfer of title to these facilities from Adelphia to MCI. The parties must petition the Board for approval of the transfer of title
12. In the future, should Adelphia decide to rebuild or overlash additional facilities for cable television related services along the 10 mile system which is the subject of the Agreement, and it is found that Adelphia's actions in this regard have resulted in additional make-ready costs, these additional costs shall not be included as part of a "cost-of-service" rate filing should Adelphia choose to make such a filing.

DATED: February 2, 2000

BOARD OF PUBLIC UTILITIES
BY:

(signed)

HERBERT H. TATE
PRESIDENT

(signed)

CARMEN J. ARMENTI
COMMISSIONER

(signed)

FREDERICK F. BUTLER
COMMISSIONER

ATTEST:

(signed)

EDWARD D. BESLOW
ACTING SECRETARY